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NO. 63551-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In Re the Dependency of Peter T. (dob 9/12/2000), Jaycob I. (dob
2/21/2005), and Oscar T. (dob 8/17/2006)

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler, Judge

BRIEF OF RESPONDENT

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A. INTRODUCTION

Respondent Peter Tsimbalyuk is the father of three boys: Peter T., Jr., Jaycob I., and Oscar T. The boys' mothers have relinquished their rights and have no legal relationship with the children. The boys live with their father's relatives: Peter Jr. lives with his grandmother and Jaycob and Oscar live with their aunt. Mr. Tsimbalyuk and his children have a strong bond, and although he is not their primary caretaker he is actively involved in their lives.

Notwithstanding this bond, the State filed a petition to terminate Mr. Tsimbalyuk's relationship with his boys. At the termination trial, the CASA testified that continued contact with the father would serve the best interests of the children. She said, "I think Peter Jr. especially has a bond with his father, but I think for all boys to have contact with their father is a good thing."

Similarly, the psychologist that the State called as a witness testified that it would not be in the children's best interest to have a legal document that severed the father's ties and provided for no visitation with the children. In his report he wrote, "I would argue against termination of parental rights." He recommended: "I think that the CASA and court may want to consider a guardianship of the boys with one or another of Mr. Tsimbalyuk's sisters or his

mother, should they agree and be found suitable. This would allow Mr. Tsimbalyuk to remain an important part of his children's lives."

Consistent with the testimony of these witnesses, the trial court found that the State failed to prove termination of the parent-child relationship would serve the children's best interests, and failed to prove that continuation of the parent-child relationship clearly diminished prospects for early integration into a stable and permanent home. The court therefore denied the petition for termination. The court also denied a subsequent motion by the State to vacate judgment under CR 60(b).

The State and CASA moved for discretionary review of the denial of the termination petition, but have not even attempted to satisfy the requirements of RAP 2.3(b). The State also appealed the denial of its CR 60(b) motion, but the trial court properly exercised its discretion in denying that motion, because the State's failure to prove its case at trial does not constitute an "irregularity" justifying relief under the rule.

In sum, the trial court correctly rejected the appellants' all-or-nothing, terminate-or-return ultimatum, and instead focused on the children's best interests. This Court should deny review.

B. COUNTERSTATEMENT OF ISSUES

1. Did the juvenile court properly exercise its discretion in denying the State's CR 60(b) motion to vacate the order denying the petition to terminate Peter Tsimbalyuk's relationship with his children, where the State was simply dissatisfied with the court's ruling on the merits and there were no procedural irregularities?

2. Should this Court deny discretionary review of the juvenile court's order denying termination, where the State's own witnesses testified that continued contact with the father served the children's best interests and that guardianship with the relative caregivers would be preferable to termination?

C. STATEMENT OF THE CASE

a. Peter Tsimbalyuk's Family History. Respondent Peter Tsimbalyuk is the father of three boys: Peter T., Jr., Jaycob I., and Oscar T.¹ CP 266; 1 RP 52. Peter was born on September 12, 2000, to Mr. Tsimbalyuk and Veronica Haupt. 1 RP 52-53. Ms. Haupt left the family three months after giving birth to the boy, so Mr. Tsimbalyuk raised Peter with the help of his extended family, including his mother and his sisters Jane and Lena. 1 RP 124; 2 RP 202; 7 RP 904.

¹ This brief will refer to the children by their first names and to the father as "Mr. Tsimbalyuk."

Mr. Tsimbalyuk is close with his family, and he helps his mother a lot because she has limited English skills. 1 RP 160; ex. 42 at 3. Mr. Tsimbalyuk has had steady employment as a prep cook and dishwasher at Anthony's Home Port for several years. 1 RP 51; 7 RP 913. He has been working since he was 17 years old, when he left school to get a job to help his mother support the family. 7 RP 912.

A few years after Peter's birth, Mr. Tsimbalyuk met Toby Irby and they began dating. Ms. Irby gave birth to son Jaycob on February 21, 2005. CP 267. However, the Department of Social and Health Services removed Jaycob from his parents' care as soon as he was born, because the mother "had a breakdown" at the hospital, and the mother's rights to other children (not by Mr. Tsimbalyuk) had previously been terminated due to drug abuse and mental illness issues. CP 268-69; Ex. 9; 2 RP 186-87. Although Mr. Tsimbalyuk was present at Jaycob's birth and Ms. Irby indicated he was the father, the Department referred him for genetic testing. 1 RP 61-62; Ex. 9 at 5.

Mr. Tsimbalyuk established paternity, and both Ms. Irby and Mr. Tsimbalyuk entered agreed orders of dependency as to Jaycob in May of 2005. CP 267; Exs. 9, 10. The mother was ordered to

perform many services, but Mr. Tsimbalyuk did not have any identified deficiencies other than possible past drug use. Ex. 10. Indeed, he was still raising his first son, Peter, in his home at the time, and the Department had no concerns about the oldest boy. 2 RP 202, 259, 270. Accordingly, the only services ordered for Mr. Tsimbalyuk were (1) random urinalysis ("UA's") two times per week, and (2) a drug/alcohol evaluation. CP 268; Ex. 11 at 3, 8.

Mr. Tsimbalyuk complied right away. 2 RP 272. He completed the evaluation before the October 21, 2005 permanency planning hearing, and the evaluator determined that Mr. Tsimbalyuk did not have a drug or alcohol problem. 1 RP 62; Ex. 12 at 2-3, 8. All of Mr. Tsimbalyuk's UA's were clean, and he was relieved from further UA testing on January 13, 2006. Ex. 13 at 7. In the meantime, Mr. Tsimbalyuk requested, and was granted, regular visitation with Jaycob. 2 RP 203-04; ex. 11 at 10.

Jaycob was returned to the home of Mr. Tsimbalyuk and Ms. Irby in March, 2006. CP 269; 1 RP 62; 2 RP 261. The social worker visited regularly, and while he had concerns about the mother's bond with Jaycob, he did not have such concerns regarding the father, Mr. Tsimbalyuk. 2 RP 267. While the mother sat on the couch, the social worker "would notice the father on the

floor playing with Jaycob, very appropriately.” 2 RP 266. Mr. Tsimbalyuk also fed the boy and changed his diapers. 2 RP 271. And the social worker “didn’t have any concerns” regarding Mr. Tsimbalyuk’s parenting of his older son, Peter. 2 RP 270.

Ms. Irby gave birth to Oscar on August 17, 2006. CP 266. The Department did not file a dependency petition for Oscar, and indicated that it would soon move to dismiss the dependency petition for Jaycob. According to the DSHS social worker, there was never a concern of inadequate food, healthcare, clothing, cleanliness, schooling, or housing for the children when they lived with their parents. 6 RP 764.

But in November of 2006, Ms. Irby relapsed and came home from a party high on drugs. Mr. Tsimbalyuk was angry and worried that her relapse would prevent the dismissal of Jaycob’s dependency and legal reunification of the family. 3 RP 388. Unfortunately, he responded to this fear by assaulting Ms. Irby. CP 269; 1 RP 127; 2 RP 238. Although criminal charges were later dropped, Mr. Tsimbalyuk admitted the assault, and all three children were removed from the home. 1 RP 72; 3 RP 385; ex. 16. Jaycob’s dependency order was not dismissed, and dependency orders were entered as to Peter and Oscar on May 18, 2007. CP

267; Ex. 21. Peter was placed with Mr. Tsimbalyuk's relatives, while Jaycob and Oscar initially remained with their mother. 2 RP 283. But Jaycob and Oscar were soon removed from the mother because she used cocaine, drove while under the influence of drugs, and left her children with strangers. 2 RP 284. The two boys were then placed with Mr. Tsimbalyuk's sister, Lena, and her husband, Sergey. 1 RP 70.

The court ordered Mr. Tsimbalyuk to participate in domestic violence ("DV") batterers' treatment, obtain a psychological evaluation, take a parenting class, and again submit to random UA's. CP 268; Ex. 21 at 8. Mr. Tsimbalyuk engaged in all of these services. 7 RP 914; Ex. 23 at 4. He completed another round of clean UA's, submitted to a psychological evaluation, passed an approved 8-week parenting class, and engaged in individual counseling. CP 268; 3 RP 400; ex. 23 at 7; ex. 25 at 8. He attended 14 sessions of DV treatment with Doug Bartholomew and completed extensive written assignments, but withdrew from the program when Mr. Bartholomew ordered him to restart from step one after he failed a polygraph test. 4 RP 513; CP 270; ex. 44.

He then enrolled at Coastal DV Treatment and attended classes for several months, making "small, but discernible, steps

forward." 2 RP 344; CP 271; ex. 45. He attended at least 12 sessions and was always on time, but he was discharged for being too quiet in group sessions and for failing to complete one of the written assignments. CP 271; 2 RP 306, 309; ex. 42 at 5; ex. 45. At the February 4, 2008 review hearing, the court found, "Mr. Tsimbalyuk has completed most of his court ordered services except for the Domestic Violence Batterer's Program." Ex. 28 at 5. The DSHS social worker thought Mr. Tsimbalyuk had "a lot of strengths," but was concerned about his relationship with Ms. Irby. 2 RP 363.

The psychological evaluator, Dr. Borton, concluded that "Mr. Tsimbalyuk presented as a normal parent." 3 RP 414. He reported, "His parenting skills are fine." Ex. 42 at 13. Nevertheless, Dr. Borton made a "provisional diagnosis" of anti-social personality disorder. CP 272; ex. 42 at 11. In other words, Mr. Tsimbalyuk's traits "conspire to be on the antisocial personality disorder spectrum, I guess you could say." 3 RP 427.

Mr. Tsimbalyuk engaged in 14 counseling sessions with a mental health provider and made progress. 5 RP 586. According to the counselor, Mr. Tsimbalyuk clearly regretted the assault and

"it was obvious that he understood several principles of batterers' treatment." 5 RP 624.

In the meantime, Mr. Tsimbalyuk participated in regular visitation with his three sons. 1 RP 73; 2 RP 358; ex. 23 at 5, 8. The social worker who supervised the visits said Mr. Tsimbalyuk "would always bring food and, you know, was very attentive to when they needed a diaper change. He was very attentive to the clothing that they wore, the proper clothing, and to their grooming." 2 RP 359. He played with the children, held them while they napped, hugged and kissed them frequently, and calmed them down when they threw tantrums. Ex. 61.

The psychologist, Dr. Borton, also observed visits. 3 RP 417. He reported that unlike most parents, Mr. Tsimbalyuk arrived at the visits prepared with diaper changes, toys, and food. Ex. 42 at 8. Mr. Tsimbalyuk played with the boys, fed them, mediated their disputes, and changed both Oscar's and Jaycob's diapers. Ex. 42 at 8. Dr. Borton noticed that:

The boys seemed happy with each other and happy with Mr. Tsimbalyuk. ... They were not reserved in his presence. They did not seem afraid of him at all. Mr. Tsimbalyuk had food for the kids, I think raisins and a sandwich and stuff, that they were kind of passing back and forth. It was all really pleasant.

3 RP 417. He concluded:

Mr. Tsimbalyuk was attentive to safety issues, aware of his children's needs, able to divide his attention between the children well, affectionate with his children, encouraging the children to interact and attend to each other, and able to handle difficult behavior effectively with distraction and without overt power/control tactics.

Ex. 42 at 9.

Notwithstanding this progress, the court changed the permanency plan "to make return home an alternative plan with primary plan of adoption and/or dependency guardianship with paternal relative." Ex. 25. The court also directed DSHS to file a termination petition. Ex. 23 at 9. The Department filed the petition on July 22, 2008, and the termination trial commenced on February 10, 2009.² CP 1-17; 1 RP.

b. The Termination Trial. Several witnesses testified at the termination trial. The State called the psychologist, Dr. Borton, and asked him for his "overall conclusions about Mr. Tsimbalyuk's ability to parent his children in the long term." 3 RP 423. Dr. Borton testified:

I think on a moment-to-moment basis, he plays well with his children. They appear to care for him. He

² Ms. Irby voluntarily relinquished her parental rights with respect to Jaycob and Oscar. CP 266-67. Veronica Haupt's parental relationship with Peter, Jr., had previously been terminated. CP 266.

appears to care for them. I think I mentioned in the report that I did not think that termination made sense at the time, because there were other options at the time. I don't know what's happened since, but there were other options at the time, that a relative placement could have occurred, and then I could imagine him being a very good visiting parent.

3 RP 424. Dr. Borton continued, "I think that he needs somebody to be the full-time parent with these children. And that he can play an ancillary role to that." 3 RP 431. The doctor said, "I would have no problem, really, with Mr. Tsimbalyuk participating in that process as a visiting parent, as a favorite uncle. That kind of role, with a guardianship with those other women [the aunt and grandmother]." 3 RP 432.

Dr. Borton supported ongoing contact between Mr. Tsimbalyuk and his children. 3 RP 436. He testified that it would not be in the children's best interest to have a legal document that severed the father's ties and provided for no visitation with the children. 3 RP 466. This testimony was consistent with his report, in which he wrote, "I would argue against termination of parental rights." Ex. 42 at 12. He recommended:

I think that the CASA and court may want to consider a guardianship of the boys with one or another of Mr. Tsimbalyuk's sisters or his mother, should they agree and be found suitable. This would allow Mr.

Tsimbalyuk to remain an important part of his children's lives

Ex. 42 at 12. Dr. Borton explained that the arrangement should be "like in a divorce," where Mr. Tsimbalyuk would not be the primary parent, but would be the "visiting parent." 3 RP 467.

The CASA concurred that continued contact with the father would serve the best interests of the children. 7 RP 869. She said, "I think Peter, Jr. especially has a bond with his father, but I think for all boys to have contact with their father is a good thing." 7 RP 869. She noted that she was initially much more concerned about the mother's parenting ability, but that Mr. Tsimbalyuk "seemed steadier," was "very good about taking care of business with his services," and was "very consistent with visitation." 6 RP 802, 818, 848. According to the CASA, the boys enjoy their weekly visits, and the CASA never had concerns about the father's visits with the boys. 6 RP 853-55.

The CASA testified that Peter Jr. "definitely" has a positive relationship with his father. 7 RP 867.

He loves his dad and it's very clear. Everything – I mean, just the way that he speaks, and he has a picture or two of his dad in his room and – but also just in terms of everything that I've seen, he loves his dad and enjoys spending time with his father.

7 RP 867-68. The CASA described the extended family as “quite close-knit.” 7 RP 868. At the time of the termination trial, the whole group spent weekly visitations together, with Mr. Tsimbalyuk driving his mother and little Peter to Lena and Sergey’s home to visit Jaycob and Oscar. 7 RP 869. But even when Mr. Tsimbalyuk’s mother was present at visitation, Mr. Tsimbalyuk took on the primary parenting duties. Ex. 61. Mr. Tsimbalyuk also drove his mother and Peter Jr. to the boy’s school events and meetings. 7 RP 904.

The children are not aware of the legal proceedings regarding their welfare. 6 RP 853. According to the CASA, the current setup is not “creating stress” for the children. 7 RP 877.

When the State’s attorney asked the father whether the boys were doing well, he responded, “My family takes good care of them.” 2 RP 214. Mr. Tsimbalyuk’s family was very supportive of his relationships with his children. 5 RP 619.

c. The Trial Court’s Ruling. The court ruled that the children should not return to Mr. Tsimbalyuk’s home. The court did not fault Mr. Tsimbalyuk for giving up on the DV treatment programs after months of hard work, especially in light of a Washington State Institute of Public Policy Paper that concluded “these programs

have no impact whatsoever on domestic violence recidivism.” CP 270-71. However, the court concluded that Mr. Tsimbalyuk had not corrected his domestic violence deficiency, and would not be able to do so in the near future. CP 271. According to the court, Mr. Tsimbalyuk “would require more counseling with external monitoring in order to make progress towards establishing a healthy self-disciplined lifestyle.” CP 272.

But the court denied the department’s petition to terminate Mr. Tsimbalyuk’s parental relationship with the boys, finding the State had failed to prove termination would serve the children’s best interests and failed to prove that the father’s continued relationship with his sons clearly diminished their prospects for early integration into a stable and permanent home. 7 RP 997-98; CP 273, CP 275-76. The court found, “Dr. Borton recommended that the father continue to have an ancillary role in the children’s life,” and “did not recommend that termination of parental rights occur between Mr. Tsimbalyuk and his children.” CP 272.

The court noted that although it was not obliged to consider alternatives like guardianships, it was not precluded from doing so. 7 RP 997; CP 276. The judge concluded, “I don’t believe it is in the best interest of these children that they have no future contact with

Mr. Tsimbalyuk, which is the result of termination.” 7 RP 997-98; CP 273. Rather, “[t]he court is persuaded that a continued relationship with Mr. Tsimbalyuk while in the custody of relatives is in the children’s best interests.” CP 274.

I find that the petitioner has not proved by clear, cogent and convincing evidence that the current homes are not stable and permanent short of termination and adoption. While ... there is evidence that the aunt and grandmother would prefer adoption, I’m not persuaded that they would terminate their relationship with these children if adoption was not the sole option. And if they did, I would have my doubts as to their commitment to the children.

The court concludes that dependency guardianship or long-term relative care is in the best interest of the children because it allows for Mr. Tsimbalyuk to maintain the right to see the children, which is in these three children’s best interest.

7 RP 998-99; CP 274-76.

The court encouraged the parties to file a dependency guardianship petition as it would serve the children’s best interests.

7 RP 999; CP 275.

When the parties appeared before the court for entry of written findings, the CASA asked the court to delay entry of the order until after the family could meet and discuss the options of guardianship or third-party custody. 8 RP 4. The CASA stated that if the family could not reach an agreement, she wanted the court to

reopen the evidence so the relatives could testify. Mr. Tsimbalyuk objected, noting that the relatives could have testified at the termination trial. 8 RP 5.

The court refused to delay entry of its order, concluding that "it is really bad policy for a process to exist in which the court goes to a trial, makes a decision, and then the party that loses uses the court's decision to seek a reopening." 8 RP 7. The fact that parties "expect to win and don't win doesn't [provide] a basis for reopening." 8 RP 8. The court noted that the department could file another termination petition if it thought that was the best course of action. 8 RP 8.

However, the Department did not file a new termination petition. Nor did it file a guardianship petition or work toward third-party custody, despite the court's finding (and the psychologist's testimony) that such an arrangement would serve the children's best interests. Instead, the department moved for discretionary review of the denial of the termination petition in this Court, and simultaneously filed a motion to vacate judgment under CR 60(b) in the trial court. CP 277, 319-52.

The trial court denied the CR 60(b) motion. CP 358-59. The department then filed a notice of appeal as to that denial, and a

motion to consolidate it with the notice of discretionary review as to the denial of the termination petition. This Court consolidated the cases and appointed appellate counsel for Mr. Tsimbalyuk.

D. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE STATE'S MOTION TO VACATE JUDGMENT UNDER CR 60(B).

The State contends the trial court abused its discretion in denying its motion to vacate judgment, essentially arguing that the trial court was required to reopen the case to hear new evidence because DSHS failed to prove its case the first time around. The State is wrong. CR 60(b) is not designed to give the losing party a second bite at the apple. The Department's proper course of action – if it was determined not to proceed with a guardianship or third-party custody – was to file a second termination petition.

“A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should not be overturned on appeal unless it plainly appears that this discretion has been abused.” In re the Guardianship of Adamec, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983). Discretion is abused where it is exercised on untenable

grounds or for untenable reasons. In re the Marriage of Tang, 57

Wn. App. 648, 653, 789 P.2d 118 (1990).

CR 60(b) provides, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- ...
- (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
- ...
- (11) Any other reason justifying relief from the operation of the judgment.

Subsection (1) "does not authorize a court to correct its own mistakes, but it applies only to the modification of judgments or orders entered against a party through his own mistake, inadvertence, surprise or excusable neglect." Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc., 68 Wn.2d 756, 758, 415 P.2d 501 (1966) (emphasis in original).

In its motion to the trial court, the State argued that "the [juvenile] court's unspoken expectation of evidence it believed should have been presented created an irregularity in the proceedings, which [the juvenile] court can remedy by allowing for

presentation of the evidence it found lacking.” CP 324; see also DSHS brief at 39. In other words, the department claims that its failure to prove its case constitutes an irregularity requiring vacation of judgment under CR 60(b)(1). This argument is without merit.

DSHS may be surprised that it lost at trial, but the juvenile court’s refusal to rubber-stamp the department’s termination petition is not an “irregularity” for purposes of CR 60(b). See Adamec, 100 Wn.2d at 177 (court acting within its powers in adopting one recommendation over another does not constitute irregularity).

An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner.

Port of Port Angeles v. CMC Real Estate Corporation, 114 Wn.2d 670, 674, 790 P.2d 145 (1990) (quoting In re Ellern, 23 Wn.2d 219, 222, 160 P.2d 639 (1945)).. “Cases relying on this ground typically involve procedural defects unrelated to the merits.” Tang, 57 Wn. App. at 654. For example, vacation of a default judgment for “irregularity” would be appropriate where a summons was mailed to the wrong address. 4 Karl B. Tegland, Washington Practice: Rules

Practice at 552 (5th ed. 2006) (citing State ex rel. Cole v. Blake, 123 Wash. 336, 212 P. 549 (1923)). But here, the juvenile court did not fail to follow a prescribed rule or procedure during the termination trial. The State is simply dissatisfied with the court's decision on the merits. Accordingly, the court properly denied the motion to vacate judgment. See Port Angeles, 114 Wn.2d at 677.

DSHS contends that “[w]hile errors of law must be preserved through an appeal rather than a CR 60(b) motion, the court has the authority to correct those mistakes of fact which formed the basis for an incorrect legal ruling.” DSHS brief at 38. DSHS misunderstands the relevant distinctions. “The distinction is not between mistakes of fact and mistakes of law, but between errors of law and irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings.” Marie’s Blue Cheese, 68 Wn.2d at 758. “[I]nsufficiency of the evidence is not an error that is extraneous to the action or affects the regularity of the proceedings.” Burlingame v. Consolidated Mines and Smelting Co., 106 Wn.2d 328, 336, 722 P.2d 67 (1986).

The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a

means for the court to review or revise its own final judgments.

Marie's Blue Cheese, 68 Wn.2d at 758 (quoting 1 Black on Judgments (2d ed.) 506, § 329).

As to the catchall provision, "[t]he use of Cr 60(b)(11) is to be confined to situations involving extraordinary circumstances not covered by any other section of the rule." Tang, 57 Wn. App. at 655. "Such circumstances must relate to irregularities extraneous to the action of the court." Id. at 655-56. It is intended to be used only "in extreme, unexpected situations." In re Detention of Ward, 125 Wn. App. 374, 379, 104 P.3d 751 (2005). For example, the trial court vacated an order dismissing a case with prejudice for discovery violations where the plaintiff later discovered that her attorney's failure to comply was due to severe mental illness. Barr v. MacGugan, 119 Wn. App. 43, 78 P.3d 660 (2003). This Court affirmed the trial court's decision to grant the motion because the case had never been decided on the merits, the circumstances were extraordinary, and "[t]he irregularities that affected the proceedings below were entirely outside the control of the plaintiff, the defendant, and the court." Id. at 48. But here, the case was decided on the merits, the State did not present any extraordinary

circumstances extraneous to the action of the court, and the State is allowed a second bite at the apple through the filing of another termination petition. Accordingly, the trial court properly denied the motion to vacate.

Finally, DSHS argues that, pursuant to CR 60(e), the juvenile court was required to hold a hearing on the State's motion to vacate instead of denying it on the pleadings. DSHS brief at 36-37. That is incorrect. This Court has held that "nothing precludes a trial court from issuing an order in favor of the nonmoving party without hearing oral argument if that party received notice of the motion and had an opportunity to respond." Stoulil v. Epstein, 101 Wn. App. 294, 298, 3 P.3d 764 (2000). Indeed, "oral testimony is not the general rule and is discretionary." Roberson v. Perez, 123 Wn. App. 320, 331, 96 P.3d 420 (2004). In Stoulil, this Court recognized that:

Epstein's own failure to bring the tax documents to the trial court's attention at trial does not give rise to a "duty" on the trial court's part to grant his hearing request and allow him to present arguments he could have presented at trial.

Id. at 299.

The same is true here. DSHS's own failure to call the relative caregivers to testify at trial does not give rise to a duty on

the trial court's part to grant the State's hearing request and allow it to present arguments it could have presented at trial. This is especially so given that DSHS may simply file another termination petition if it still believes termination is the best course of action.

In sum, the trial court properly exercised its discretion in denying the motion to vacate judgment. Mr. Tsimbalyuk respectfully asks this Court to affirm the ruling.

2. THIS COURT SHOULD DENY DISCRETIONARY REVIEW OF THE DISMISSAL OF THE TERMINATION PETITION, BECAUSE THE TRIAL COURT PROPERLY FOUND THAT THE STATE FAILED TO PROVE ITS CASE.

a. The State has no right to appeal the dismissal of a petition to terminate parental rights. This Court has held that "the State is not entitled to appeal as a matter of right from the dismissal of a petition for permanent deprivation of parental rights." In re Dependency of A.G., 127 Wn. App. 801, 802, 112 P.3d 588 (2005), review denied, 156 Wn.2d 1013 (2006). In A.G., as in this case, the trial court had found the department failed to prove RCW 13.34.180 (1)(f) – that continuation of the parent-child relationship clearly diminished prospects for early integration into a stable and permanent home – because the child was living with a relative. Id. at 804-05. Also as in this case, the relative who expressed interest

in adoption did not testify at the termination trial, and the court found that there was no evidence she would not be willing to care for the child under a more inclusive arrangement. Id. at 805.

The State appealed, and this Court held that RAP 2.2(a) did not provide a right to appeal the denial of a termination petition.³ Id. This Court noted that subsection (6) of RAP 2.2(a) allows appeals as of right for aggrieved parents, but that no counterpart existed for cases the Department lost – presumably because the Department, unlike parents, could simply try again. Id. at 806. Indeed, the Court concluded that the denial of a termination petition is not appealable under RAP 2.2(a)(1), (3), or (13) for that very reason: It is not a final judgment because it does not “end the overall action.” Id. at 807. Rather, the dependency is still in place, and the State is free to file another termination petition.⁴ Id.

The appellants here act as if the denial of the termination petition is appealable as of right simply by virtue of the fact that the denial of a CR 60(b) motion is appealable. Endorsing this practice

³ This Court further held that discretionary review was not warranted. Id. at 808-09.

⁴ In this case the State claims it did not file another termination petition because of “inherent delays” in the process. DSHS Brief at 37 n.7. But if the State really cared about employing the most expeditious solution, it would have filed a second termination petition and been finished with a second termination trial by now. The fact that it instead filed a frivolous CR 60(b) motion and appeal belies any claim of urgency.

would allow DSHS to achieve indirectly what it cannot achieve directly, and would encourage inefficiencies. Any time the Department lost a termination trial, it could simply file a frivolous CR 60(b) motion and appeal its denial as an end-run around its inability to appeal the denial of the termination petition. Cf. Wiley v. Rehak, 143 Wn.2d 339, 347, 20 P.3d 404 (2001) ("CR 60 cannot be used merely to circumvent the time constraints of other rules").

State v. Gaut is instructive. 111 Wn. App. 875, 46 P.3d 832 (2002). There, a criminal defendant appealed an order denying a motion to withdraw a guilty plea. Id. at 876. However, the assignments of error focused not on the denial of that motion but rather on the underlying judgment and sentence. Id. The State complained that the defendant was using the appeal of the denial of the motion to withdraw a guilty plea as an end-run around his inability to appeal the underlying conviction (in that case because the time had expired). Id. at 880. This Court agreed, stating:

The order appealed from here is the denial of a postjudgment CrR 4.2(f) motion. The rules anticipate these belated motions and provide for them to be treated as a motion to vacate the judgment under CrR 7.8(b). An order denying the motion is appealable as of right. RAP 2.2(10). ... When Mr. Gaut's motion to withdraw his plea was denied, therefore, he could properly appeal. But our scope of review is limited to

the trial court's exercise of its discretion in deciding the issues that were raised by the motion.

Id. at 881. In other words, “[o]n review of an order denying a motion to vacate, only ‘the propriety of the denial, not the impropriety of the underlying judgment’ is before the reviewing court.” Id. (quoting Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980)).

Here, as in Gaut, the appellants’ briefs focus almost exclusively on what they perceive to be errors in the underlying judgment dismissing the termination petition, not on the alleged error in denying the motion to vacate. The CASA’s 34-page brief presents no argument whatsoever on the CR 60(b) issue. The Department devotes only the last six pages of its 43-page brief to the topic, and only one of the eight assignments of error. Clearly, the appellants’ primary challenge is not to the denial of the CR 60(b) motion, but to the dismissal of the termination petition. Their attempts to bootstrap a right to appeal the dismissal of the termination petition should be rejected. The dismissal of the termination petition is subject to the discretionary review rules of RAP 2.3. As explained below, discretionary review is unwarranted.

b. Discretionary review is unwarranted because the trial court's decision did not alter the status quo or limit the freedom of a party to act. RAP 2.3 provides:

[D]iscretionary review may be accepted only in the following circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). Although the State does not explain under which subsection of the rule it is proceeding, Mr. Tsimbalyuk assumes the State is arguing review is warranted under RAP 2.3(b)(2). See In re Marriage of Greenlaw, 67 Wn. App. 755, 759, 840 P.2d 223 (1992) (RAP 2.3 "permits this court to grant discretionary review in

cases where it appears that the superior court has committed probable error which substantially alters the status quo”).

However, the State cannot prevail because the decision of the superior court did not substantially alter the status quo and did not substantially limit the freedom of a party to act. To the contrary, the decision maintained the status quo: the children remained dependent children in the care of relatives. Nor did the ruling substantially limit the freedom of a party to act. Mr. Tsimbalyuk can still see his children, and the State can still provide services to the family, still pursue a variety of alternative permanent plans, and still file a termination petition. Thus, RAP 2.3(b) is not satisfied, and the Court need not reach the argument below.

c. Even if the trial court’s decision had altered the status quo, discretionary review would be unwarranted because the trial court did not commit probable error; rather, the trial court credited the State’s own witnesses who testified that continued contact with the father served the children’s best interests. Even if the second clause of RAP 2.3(b)(2) were satisfied, the first is not. The juvenile court did not commit probable error in concluding that the State

failed to prove its case.⁵ The court properly credited the testimony of the State's own witnesses who stated that severing the children's ties to their father would not serve their best interests, and that a guardianship would be the best solution.

i. The psychologist and CASA both testified that continued contact with Mr. Tsimbalyuk served the children's best interests, and the psychologist testified that a guardianship would be better for the children than termination of their father's rights.

The appellants wrongly claim that "no evidence" supported the trial court's conclusions that the State failed to prove termination would serve the children's best interests, as required under RCW 13.34.190, and failed to prove continuation of the parent-child relationship clearly diminished prospects for early integration into a stable and permanent home, as required under RCW 13.34.180(1)(f). DSHS brief at 17; CASA brief at 1-2, 20.

⁵ And even if this case were appealable as of right, the Department's arguments would fail under the standard of review applicable to direct appeals of termination rulings. Deference to the trial court is "particularly important in deprivation proceedings." In re Dependency of K.R., 128 Wn.2d 129, 144, 904 P.2d 1132 (1995). The juvenile court's findings must be upheld if they are supported by substantial evidence. In re Dependency of C.B., 61 Wn. App. 280, 286, 810 P.2d 518 (1991). Because only the trial court has the opportunity to hear the testimony and observe the witnesses' demeanor, this Court will not judge the credibility of the witnesses or weigh the evidence. In re Dependency of A.V.D., 62 Wn. App. 562, 568, 815 P.2d 277 (1991). "On appeal, we are constrained to place very strong reliance on trial court determinations of what course of action will be in the best interests of the child." In re Dependency of Ramquist, 52 Wn. App. 854, 860, 765 P.2d 30 (1988) (emphasis in original).

The appellants ignore the testimony of their own witnesses, who stated that the children were strongly bonded to their father and that continued contact would serve the boys' best interests. The State called the psychologist, Dr. Borton, who testified that it would not be in the children's best interest to have a legal document that severed the father's ties and provided for no visitation with the children. 3 RP 466. This testimony was consistent with Dr. Borton's report, in which he wrote, "I would argue against termination of parental rights." Ex. 42 at 12 (emphasis added). He recommended:

I think that the CASA and court may want to consider a guardianship of the boys with one or another of Mr. Tsimbalyuk's sisters or his mother, should they agree and be found suitable. This would allow Mr. Tsimbalyuk to remain an important part of his children's lives

Ex. 42 at 12.

Dr. Borton further testified that the children appear to care for their father and he appears to care for them. 3 RP 424. He explained that Mr. Tsimbalyuk could "play an ancillary role" while the relatives served as primary caretakers. 3 RP 431. The doctor said, "I would have no problem, really, with Mr. Tsimbalyuk participating in that process as a visiting parent, as a favorite uncle.

That kind of role, with a guardianship with those other women.” 3
RP 432.

Consistent with this testimony, the trial court found:

Dr. Borton observed positive interactions between the father and Jaycob and Oscar. ... Dr. Borton recommended that the father continue to have an ancillary role in the children's life such as a "favorite uncle," but that someone else should be the children's primary parent. Dr. Borton did not recommend that termination of parental rights occur between Mr. Tsimbalyuk and his children.

CP 272 (Finding of Fact 1.17). Appellants did not assign error to this finding, so it is a verity on appellate review. State v. O'Neill, 148 Wn.2d 564, 572, 62 P.3d 489 (2003).

The CASA concurred with Dr. Borton that continued contact with the father would serve the best interests of the children. 7 RP 869. She said, "I think Peter Jr. especially has a bond with his father, but I think for all boys to have contact with their father is a good thing." 7 RP 869.

In order to satisfy RCW 13.34.180(1)(f), the State must prove that continuation of the parent-child relationship will harm the child. In re Dependency of K.S.C., 137 Wn.2d 918, 930, 976 P.2d 113 (1999). In this case, the State proved the opposite: that termination of the parent-child relationship would harm the children.

Thus, the State failed to prove RCW 13.34.180(1)(f) and failed to prove termination would serve the children's best interests as required under RCW 13.34.190. Accordingly, the court properly denied and dismissed the termination petition.

It appears the appellants are confused about what the juvenile court may consider in determining whether termination serves the best interests of the child and whether the State has proved subsection (f) of RCW 13.34.180(1). The State argues that because the court is not required to consider alternatives to termination like dependency guardianships and third-party custody, that it may not consider such alternatives. DSHS brief at 20; CASA brief at 20. That is not the law. As the juvenile court understood:

Although the court is not obliged to consider a dependency guardianship or other third party custody arrangement prior to granting termination, the law does not preclude the court from considering it in the context of whether or not the finality of a termination is in the best interests of the children.

CP 276 (Conclusion of Law 2.3) (emphasis added). See K.S.C., 137 Wn.2d at 931 (statute does "not require a court to consider a dependency guardianship ... where the State has petitioned for termination").

Here, although there was no guardianship petition before the court, there was plenty of evidence – as described above – that maintaining a legal relationship with the father served the children’s best interests and did not impede their integration into a stable and permanent home. Contrast In re Dependency of T.C.C.B., 138 Wn. App. 791, 801, 158 P.3d 1251 (2007) (no petition or other evidence to support guardianship where relatives were not viable options to care for child); K.S.C., 137 Wn.2d at 930 (State proved that continuation of the parent-child relationship would harm the child, and in such circumstances a guardianship is inappropriate); Ramquist, 52 Wn. App. at 863 (best interests of child preclude guardianship as alternative to termination where only family child knows is foster family, child does not even perceive mother as his mother, and maintenance of biological bond has already hurt the child). Because the appellants’ own witnesses testified that the children’s best interests would be served by maintaining contact with their father and that a guardianship would be preferable to termination, the argument that the trial court erred in denying termination is without merit.

ii. Contrary to the appellants' all-or-nothing view, guardianship and third-party custody arrangements provide children with stable and permanent homes and serve their best interests by ensuring continued contact with their parents. Instead of acknowledging that the trial court properly credited the opinions of the State's own experts, the appellants accuse the court of "sentencing" the children to "a lifetime of legal limbo," and destroying their opportunity for a "forever home." DSHS brief at 41-42; CASA brief at 17. This resort to maudlin hyperbole may be an effort to mask the Department's true motivations, which are likely fiscal. See Children and Family Research Center, Family Ties: Supporting Permanence for Children in Safe and Stable Foster Care with Relatives and Other Caregivers (October, 2004); Meryl Schwartz, Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare, 22 N.Y.U. Rev. L. & Soc. Change 441, 473 (1996) (discussing financial incentives of Adoption and Safe Families Act). But the trial court properly considered what was best for the children, not what was best for the Department's coffers.

The appellants' black-and-white, all-or-nothing, "terminate or return" view ignores the children's best interests and the benefits of

extended families. “Both success and permanency must be more expansively defined, especially in the case of children being raised by kin within extended family networks.” Sacha Coupet, Swimming Upstream Against the Great Adoption Tide: Making the Case for “Impermanence”, 34 Cap. U.L.Rev. 405, 414 (2005). This Court has properly recognized that children are not “in limbo” when they are living with committed caregivers in a stable guardianship and enjoying continued interaction with their parent. In re Dependency of A.C., 123 Wn. App. 244, 253, 98 P.3d 89 (2004). Rather, “guardianship provides a stable and permanent home while maintaining parental rights.” Id. at 256.

Experts agree that “guardianship may be more appropriate than adoption when children want to continue relationships with parents who will not be able to care for them. In such circumstances, commentators have noted that a child’s need for permanency includes a need to keep hold of the past.” Schwartz, *supra*, at 461. “There is a strong case to be made that despite the reputed panacean effect attributed to adoption, it is far from a ‘one-size-fits-all’ solution.” Coupet, *supra*, at 411. Instead, “data reveal that alternatives to adoption, including subsidized guardianships, offer the same degree of lasting permanence for children, without

the counter-therapeutic effects that accompany termination of parental rights.” Id. at 412.

Furthermore, the appellants cite outdated caselaw interpreting an old version of the statute in arguing that a guardianship is “inherently temporary” and leaves the child “in limbo.” DSHS brief at 26; CASA brief at 25, 33 (citing In re Dependency of A.V.D., 62 Wn. App. 562, 569, 815 P.2d 277 (1991)). As this Court explained in A.C., the legislature amended the statute in 1994 to “reflect the increasing interest in providing children with continuing connection to their extended families, culture, traditions and history.” A.C., 123 Wn. App. at 251. Thus, “[d]ependency guardianships now offer sufficient permanency to present a viable alternative to termination in appropriate cases.” Id.

This Court explained:

A measure of flexibility is required to allow the State to provide permanence for a child without terminating the parent’s rights. The statute provides for secure placement of the child while authorizing both visitation between parent and child and continuing involvement by state agencies.

Id. (quoting In re Dependency of F.S., 81 Wn. App. 264, 270, 913 P.2d 844 (1996)). Indeed, RCW 13.34.231(6) “logically

presupposes termination is an available option, to which guardianship is preferable." Id. at 252 n.20 (emphasis added).

Simply put, termination does not ensure permanence, and may even dispel what permanence does exist in a child's life, if it severs ties to an extended family. For this reason, the idea of permanence should not be regarded as a talisman that automatically opens the door to termination. In some situations, a dependency guardianship may provide a greater level of stability than termination, while serving the best interests of the child in other ways as well.

Id. at 252.

The juvenile court properly recognized the fallacy of the State's all-or-nothing approach to family welfare, and found that a guardianship with relatives would provide the children with stability and permanence while serving their best interests by allowing continued contact with their father.

iii. The appellants improperly read both RCW

13.34.180(1)(f) and RCW 13.34.190 out of existence. Another problem with the appellants' argument is that they read both RCW 13.34.180(1)(f) and RCW 13.34.190 out of existence. Appellants' reason:

- A finding that the State proved RCW 13.34.180(1)(f) must follow from a finding that the State proved RCW 13.34.180(1)(e); and

- A finding that the State proved that termination serves the children's best interests pursuant to RCW 13.34.190 must follow from a finding that the State proved RCW 13.34.180(1)(f).

CASA brief at 23-24, 31-32; DSHS brief at 26, 32; CP 152. In other words, according to the appellants, termination must occur if the State proves RCW 13.34.180(1)(a) - (e). That is not the law.

"Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). In addition to proving subsections (a) – (e), the State must also prove RCW 13.34.180(1)(f) by clear, cogent and convincing evidence, and must prove that termination serves the children's best interests. RCW 13.34.190.⁶ Because the State failed to prove RCW 13.34.180(1)(f) and failed to prove termination served the children's

⁶ Appellants cited a supreme court opinion for the proposition that subsection (f) of the statute no longer exists and that so long as the State proves subsection (e), it does not have to prove subsection (f). DSHS brief at 26; CASA brief at 23 (citing In re Dependency of J.C., 130 Wn.2d 418, 427, 924 P.2d 21 (1996)). But the issue in J.C. was whether subsection (e) was satisfied in that case. See J.C., 130 Wn.2d at 425. The supreme court could not have intended its dicta on subsection (f) to result in a deletion of that portion of the statute, especially since that subsection of the statute is constitutionally required. See Custody of Smith, 137 Wn.2d 1, 18, 969 P.2d 21 (1998) (under due process clause parental rights may not be infringed unless necessary to prevent harm to the child); K.S.C., 137 Wn.2d at 930 (proof of RCW 13.34.180(1)(f) shows termination necessary to prevent harm to the child).

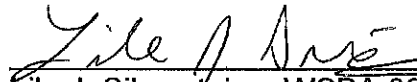
best interests, the juvenile court properly denied the petition. This Court should deny discretionary review.

E. CONCLUSION.

For the reasons set forth above Mr. Tsimbalyuk respectfully requests that this Court (1) affirm the trial court's order denying the State's motion to vacate, and (2) deny discretionary review of the order denying and dismissing the termination petition.

DATED this 16th day of October, 2009.

Respectfully submitted,


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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

IN RE P.P.T., ET AL
MINOR CHILDREN

PETER TSIMBALYUK,

RESPONDENT.

NO. 63393-7-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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